STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

JENNIFER M. GRANHOLM
GOVERNOR

STEVEN E. CHESTER
DIRECTOR

June 15, 2005

Ms. Anne Woiwode, Executive Director
Mackinac Chapter of the Sierra Club
109 East Grand River Avenue
Lansing, Michigan 48906

Dear Ms. Woiwode:

The Department of Environmental Quality (DEQ) has carefully considered the Request for Declaratory Ruling (Request) filed by your organization with the DEQ's Office of Administrative Hearings on January 21, 2005, in accordance with OAH Administrative Rule 81; 2003 ACS R 324.81. The enclosed document contains the DEQ's response to your Request. If you need further information regarding the Water Bureau's implementation of the Declaratory Ruling, please contact Mr. Richard A. Powers, Chief, Water Bureau, at 517-335-4176, or you may contact me. My office is prepared to coordinate a meeting between representatives of the Sierra Club, Water Bureau, and other interested parties to discuss the Declaratory Ruling if you wish.

Sincerely,

Steven E. Chester
Director
517-373-7917

Enclosure
cc/enc: Mr. R. Scott Jerger, Field & Associates
Mr. David Vanderhagen, Michigan Farm Bureau
Mr. Alan Hoffman, Department of Attorney General
Mr. Stanley F. Pruss, Deputy Director, DEQ
Mr. Richard Lacasse, DEQ
Mr. Richard A. Powers, DEQ

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

DECLARATORY RULING NUMBER 2005-01

Requestor:
Mackinac Chapter of the Sierra Club
109 East Grand River Avenue
Lansing, Michigan 48906
517-484-2372

SUBJECT: **National Pollutant Discharge Elimination System (NPDES) Permit MIG010000, "General Permit for New Large Concentrated Animal Feeding Operations (CAFO)"**

On January 21, 2005, the Department of Environmental Quality (DEQ) received a Request for a Declaratory Ruling (Request) and memorandum in support of the Request from the Mackinac Chapter of the Sierra Club. The Request seeks a determination on the legality of three aspects of the DEQ, Water Bureau's (WB) NPDES general permit for new large CAFOs, MIG010000 (General Permit). In considering the Request, the DEQ has also received and reviewed a Position Paper from the Michigan Farm Bureau. After careful deliberation, the DEQ rules as follows:

INTRODUCTION

As the agency charged with protecting and enhancing Michigan's environment, the DEQ respects and welcomes input from all citizens as the DEQ administers its regulatory responsibilities, pursues innovation, and makes improvements to our regulations and programs. This will enable us to move toward the long-term goals of environmental and public health protection, improved quality of life, and a sustainable future. In all of its actions, the DEQ must act within the authority granted to it by law and fairly and consistently apply regulations within the state.

The NPDES permitting framework applies to a wide breadth of business activities. The NPDES permits issued by the DEQ, WB, to regulate discharges from CAFOs contain effluent limitations, including management practices available to the agricultural community, to assure that the ultimate goal of protecting water quality in all areas of the state is met.

It is important to note that Michigan, as a state with federally-recognized authority to implement its own NPDES program, must meet all conditions set forth by the federal Clean Water Act (CWA) and its associated regulations. The DEQ, in accordance with state law and regulations, imposes requirements in its NPDES permits that are consistent with federal regulations, but more detailed and specific than the federal requirements. This is to ensure that state specific resources and water quality are protected.

The DEQ has been issuing permits to large CAFOs since 2002 and, at the time of issuance, considered the General Permit at issue here to be the most carefully created and considered CAFO permit to date. The General Permit was drafted in accordance with Part 31, Water Resources Protection, of the Michigan Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, MCL 324.3101 *et seq*, and has built upon the basic framework provided by the United States Environmental Protection Agency (USEPA) in the CAFO Rule published in February 2003 (Federal Rule).

Individual permits are also issued to certain large CAFOs and may be issued to other CAFOs if the DEQ determines that a particular farm will not be adequately covered by a general permit. In its Request, the Sierra Club is only challenging the General Permit. Since the issuance of the General Permit in June 2004, significant challenges to the Federal Rule have been heard and ruled upon by the United States Court of Appeals for the Second Circuit in the case of *Waterkeeper Alliance, Inc. v. USEPA*, 399 F.3d 486 (2d Cir. 2005) (*Waterkeeper*).

The position of the DEQ is explained in detail below in order to address each of the three issues raised by the Sierra Club in its Request. This Declaratory Ruling also considers the opinion set forth in *Waterkeeper*.

DISCUSSION

Sierra Club's Issue A:

The General Permit fails to require that discharges from CAFO land application areas meet the CWA's requirements.

1. The General Permit creates an impermissible self-regulatory scheme.
2. The General Permit fails to require that comprehensive nutrient management plans (CNMP) are incorporated as terms of the General Permit.

The DEQ does not agree with the Sierra Club's contention that the General Permit creates "an impermissible self-regulatory scheme." Best management practices (BMP), effluent limitations, and water quality standards (WQS) are all classified as

"applicable standards and regulations" governing the administration of the NPDES program. 40 C.F.R. § 122.2. Under the Federal Rule, BMPs serve as effluent limitations for permitted CAFOs. These BMPs are collectively referred to as a nutrient management plan (NMP) by the Federal Rule. Michigan, through Part 31 and associated rules, has the ability to establish permit requirements that have greater specificity than federal regulations require. MCL 324.3101 *et seq.* Part 31 prohibits the discharge of any substance that is or may become injurious to waters of the state; therefore, the General Permit prohibits discharges that may cause or contribute to a violation of state WQSs. MCL 324.3109(1). The WQSs are designed to protect designated uses of waters of the state by preventing injurious discharges. 1999 ACS R 323.1100. This more specific requirement will be met through proper implementation of the BMP-based standards required by the General Permit, within conditions currently identified as "Minimum Standards." Such a requirement, mandated by Part 31, cannot reasonably be described as self-regulatory.

Throughout its memorandum the Sierra Club mistakenly equates Michigan's CNMP with the NMP required by the Federal Rule. Although the terminology admittedly may be confusing, the CNMP and NMP are distinct regulatory measures that serve different purposes. The NMP incorporates narrative effluent limitations that the owner or operator must comply with to protect water quality. In contrast, the CNMP is a management plan for use in meeting the set of minimum standards in the General Permit, including those effluent limitations identified in the NMP. 40 C.F.R. § 122.42(e); General Permit in Part I., Section B.3. If a CAFO owner or operator fails

to implement these minimum standards, then the CAFO is in violation of the General Permit. Minimum standards are part of the Federal Rule's NMP requirements which the court in *Waterkeeper* held must be included within NPDES permits so that both the permitting authority and the public may review and evaluate the requirements in order to ascertain the appropriateness of the permit's conditions. *Waterkeeper* at 25, 28.

In fact, by including specific effluent limitations in the General Permit, the DEQ has thoroughly reviewed and defined the NMP requirements. Through the inclusion of specific land application rates including a limitation on phosphorus concentrations in soils, timing considerations, and methods to calculate allowable nutrient levels in soils within the General Permit, the DEQ has satisfied *Waterkeeper's* concerns that the Federal Rule did not prevent CAFO owners or operators "'from misunderstanding or misrepresenting their specific situation and adopting improper or inappropriate nutrient management plans, with improper or inappropriate waste application rates." *Waterkeeper* at 21 citing *Environmental Defense Center, Inc. v. USEPA*, 344 F.3d 832 (9th Cir. 2003) (*EDC*). By clearly including specific NMP requirements within NPDES permits, agency review of the NMP is accomplished and the public has the opportunity to review and provide comment on a permit's NMP.

The expectation of the DEQ is that when the NMP requirements in permits are appropriately and consistently applied at an individual farm, then discharges from the farm will meet the permit's effluent limitations, including the prohibition against causing or contributing to a violation of WQSs. The CNMP serves as a means of achieving the

effluent limits within the General Permit, and thus are only a management plan for the farm rather than a component of the General Permit.

In order to resolve the apparent confusion that has resulted by calling the NMP "minimum standards" within the General Permit, the DEQ will, in future permits, specifically designate a new section the "NMP" under the effluent limitation section of the permit and include the minimum standards and other requirements that constitute an NMP under the Federal Rule. This action serves to better align Michigan's NPDES permits with the *Waterkeeper* decision and clearly should eliminate concerns that NMPs are not reviewed by the DEQ.

Sierra Club's Issue B:

The General Permit violates the public participation requirements of the CWA.

In its Request, the Sierra Club contends that the DEQ violated the public participation requirements of the CWA by failing to provide citizens with the opportunity to comment on and enforce a farm's CNMP. Prior to responding to this allegation, it is important to discuss the difference between a general NPDES permit and certificates of coverage (COC). General NPDES permits are issued when the DEQ determines that a specific category of discharges are so similar in type and quality that one permit will provide sufficient control over any discharge in that category. 2005 ACS R 323.2191. Businesses or individuals may then apply for "coverage" under the applicable general

permit. 2005 ACS R 323.2192. Upon receipt of this application, the DEQ determines whether the discharge meets the criteria for coverage under the applicable general permit. 2005 ACS R 323.2192(b). The issuance of a COC by the DEQ stating that the discharge meets the criteria for coverage under a general permit initiates the applicant's coverage under the general permit. Id. The COC is not itself an NPDES permit, but is instead an authorization to discharge under an existing NPDES general permit. This authorization may be contested by a "person who is aggrieved by the coverage." 2005 ACS R 323.2192(c).

Public review and comment is provided for under the general permit when it is initially proposed for use. Requests for authorization under the general permit, however, do not require a separate public notice because the discharges are of a similar kind to those contemplated by the general permit. The DEQ is nonetheless mindful of the United States Court of Appeals for the Ninth Circuit's decision in *EDC* and is evaluating the effectiveness of making COCs more readily available to the public for review. As part of a pilot project, the DEQ has made all proposed CAFO COC and notices of intent available on the DEQ webpage. Comments may be submitted to the appropriate DEQ permit writer through a direct electronic mail link on the Web page. Those comments are reviewed prior to COC issuance and public hearings on notices of intent may be granted by the DEQ upon request. The posting of COC and notices of intent and taking of public comment in this fashion satisfies the requirements of both *EDC* and *Waterkeeper* while maintaining the integrity of the general permit approach.

The DEQ public noticed the draft General Permit on its Internet site, on the DEQ Calendar, in three Michigan newspapers, and by both postal mail and electronic mail to lists of interested parties. The public notice period lasted from March 26, 2004, through May 7, 2004, twelve days longer than the standard thirty-day public notice period due to interest in this particular permit. During this extended public notice period, the DEQ received 63 written comments. The DEQ additionally held public hearings, without request, in Battle Creek on April 26, 2004, and in Bay City on April 28, 2004. Seventy-seven individuals attended these hearings. The DEQ accepted written and verbal comments on the draft General Permit, and then issued a Responsiveness Summary (dated June 10, 2004) that detailed changes made to the General Permit in response to public comments. The General Permit was then issued on June 11, 2004.

With respect to the General Permit challenged by the Sierra Club, the DEQ exceeded the CWA requirements for public participation by undertaking the extended public notice and comment period and arranging two public hearings without request from the public. The Sierra Club contends that the General Permit, as public noticed, was incomplete due to the lack of a CNMP within the permit itself. The DEQ believes that the NMP requirements of the Federal Rule, which the *Waterkeeper* court held must be included within a permit and available for comment, were included throughout the General Permit. As discussed in response to the Sierra Club's Issue A above, for clarity all future NPDES CAFO permits issued by the DEQ will now contain a distinct NMP section upon which public comment will be accepted and reviewed.

Prior to developing the General Permit, the DEQ determined that CAFO discharges are so similar in type and quality that one general permit will provide sufficient control over most CAFO discharges. 2005 ACS R 323.2191. The DEQ may only issue a COC under the General Permit once it determines that the discharge meets the criteria for coverage under the General Permit. 2005 R 323.2192(b); Final Determination and Notice, February 27, 2004. For CAFOs that do not meet these criteria, an individual permit is required.

Applications for coverage under the General Permit, known as notices of intent, must include enough information to allow regulators, and citizens, to determine the appropriateness of granting authorization to discharge under the General Permit. Notices of intent are available to the public via the DEQ Web site and upon request. While the DEQ has been following the application requirements specified in the Federal Rule, for future applications for either an individual permit or coverage under a general permit the DEQ will also require identification of proposed land application areas and adjacent water bodies. This action serves to assist the DEQ in determining the appropriateness of authorization under the General Permit by taking into account all potentially impacted watersheds. Hence, the public will be provided with an expanded universe of information for review and comment.

The Sierra Club's argument that the General Permit violates the pre-issuance public participation requirements relies upon a belief that the CNMP must be made available

to the public *prior* to a decision on permit issuance. Contrary to the Sierra Club's assertion, an administratively complete COC application and the NMP requirements in the General Permit are sufficient to allow citizens to provide informed comment on the requested authorization. The *Waterkeeper* court ruled only upon the need to make NMPs available to the public prior to issuance of a permit. The DEQ has met this requirement by including specific NMP requirements in the General Permit itself, rather than require a CAFO to interpret the Federal Rule. Although the NMP requirements may not have been clearly organized in the General Permit, the NMP requirements established by the Federal Rule were included and available for public review and comment. Those requirements, as specifically identified in the General Permit, include:

(i) adequate storage of production area wastes [General Permit Part I, Section A.3, 4, 9, 10, 11 and Section B.3(g)];

(ii) proper management of mortalities [General Permit Part I, Section B.3(d)];

(iii) diversion of clean water from the production area [General Permit Part I, Section B.3(b)];

(iv) prevention of direct contact of confined animals with waters of the state [General Permit Part I, Section B.3(c)];

(v) ensuring that chemicals and other contaminants are appropriately handled [General Permit Part I, Section B.3(e)];

(vi) identification of "site-specific conservation practices" including buffers and equivalent practices [General Permit Part I, Section B.3(a) and (i)(5)];

(vii) identification of test methods for manure, litter, process wastewater, and soil [General Permit Part I, Section B.3(i)(2) and 4];

(viii) establishing protocols for land application of production area wastes to ensure agricultural utilization of nutrients [General Permit Part I, Section B.3(h) and (i)]; and

(ix) identification of records to be maintained to document the implementation of the minimum elements described above [General Permit Part I, Section A.6, 9, 10, and 11; Section B.4 and 5; and Part II, Section B.1 and 3].

The Sierra Club also contends that without access to a farm's CNMP, citizens' right to enforce the CWA at CAFOs is hindered. 33 U.S.C. § 1365. As previously stated in response to the Sierra Club's Issue A, the CNMP is not an effluent limitation, but is a management plan utilized by CAFOs to meet the effluent limitations established by the NMP portion of the General Permit and the prohibition against causing or contributing to a violation of the WQSs. The CNMP is neither part of the permit application nor the permit itself and is, therefore, not subject to the public information requirements of the CWA. 33 U.S.C. § 1342(j). However, the DEQ agrees with the Sierra Club that the CNMP, as the management plan for achieving the effluent limitations in the General Permit, is valuable to both the DEQ and the public in assessing a farm's ability to

comply with the General Permit's conditions, in particular those set forth as the NMP. Therefore, the DEQ will in the future require that copies of the CNMPs be submitted to the DEQ. Copies of the CNMPs will then be available to the public upon request.[1]

Sierra Club's Issue C:

The General Permit fails to ensure that discharges will meet the water quality requirements of the CWA.

1. The General Permit authorizes discharges into impaired water in violation of the CWA.

2. The General Permit violates the antidegradation requirements of Michigan's WQSs and the CWA.

    a. Tier 1 Waters
    b. Tier 2 and 3 Waters

WQSs are established as a "goal" for a water body. 40 C.F.R. § 131.2. Michigan's WQS are either flexible and based upon the attributes of an individual water body (such as the WQS for nutrients, 1995 ACS R 323.1060) or fixed in such a way to be considered protective regardless of the individual attributes of a water body (such as the microorganism standard, 1995 ACS R 323.1062). Both are set to ensure that *all* waters of the state, be they high quality or impaired, are protected for designated uses. MCL 324.3109(1); 1995 ACS 323.1100(1).

The Sierra Club's claim that the DEQ's reliance upon the narrative prohibition against discharges that cause or contribute to a violation of WQSs fails to meet the Federal

[1] The CNMP referred to here means only those elements of the CNMP related to conditions in an individual or general NPDES permit. The CNMP prepared under the Michigan Agriculture Environmental Assurance Program may contain other elements that need not be submitted to the DEQ.

Rule's definition of an "effluent limitation," 40 C.F.R. § 122.2, is incorrect. Effluent limitations are defined as "*any restriction* imposed by the Director on quantities, discharge rates, and concentrations of 'pollutants' which are 'discharged' from 'point sources' . . . ." Id., *emphasis added*. The requirement that discharges from CAFOs not cause or contribute to a violation of state WQSs is an added layer of water quality protection in addition to the best management practices based effluent limitations that are known as the NMP.

The DEQ shares the Sierra Club's concerns that impaired watersheds must be protected from additional impairment due to CAFO discharges. This concern is precisely why the blanket prohibition on any CAFO discharge that causes or contributes to a violation of WQSs is required by Part 31, rather than merely the best available or best conventional technology requirements contained in the Federal Rule.

The Sierra Club also alleges that the General Permit violates federal and state "antidegredation" requirements. 40 C.F.R. § 131.12; 1995 ACS R 323.1098. Michigan has a WQS that specifically details how antidegradation requirements will be applied in Michigan waters, Rule 98. 1995 ACS R 323.1098. This rule applies to any action taken pursuant to Part 31. Rule 98 classifies various types of water bodies, including: water bodies where designated uses are not attained, water bodies where the water quality is better than that required by WQSs – called "high quality waters," and high quality waters designated as "outstanding state resource waters" (OSRW).

For water bodies that do not attain designated uses, the rule does not allow any further lowering of water quality with respect to the pollutants that are causing the nonattainment. The DEQ maintains a list of these water bodies and their respective pollutants that is submitted to the USEPA and published every even-numbered year as part of the integrated report required under Sections 305(b) and 303(d) of the CWA. The DEQ considers all water bodies to be "high quality" for at least some parameters and for the purposes of implementing Rule 98. High quality water bodies designated as OSRW are specifically listed in Rule 98. This is a relatively small list, with 11 specific listings. For these water bodies, no lowering of water quality is allowed, except on a short-term, temporary, case-by-case basis.

In implementing Rule 98, the DEQ requires that applicants for individual permits provide a demonstration of the benefits foregone if the new or increased loading of pollutants is not allowed. These "antidegradation" demonstrations are made available to the public for review during the comment period for the respective draft NPDES permit. Demonstrations are not required of applicants for coverage under general permits, except for water bodies designated as OSRW, or as the DEQ may determine necessary to protect water quality. 1995 AAC R 323.1098(8)(h). However, the DEQ does review all requests for authorization pursuant to Rule 98 to determine the applicability of the general permit to the application request. This review considers the receiving water, any OSRW designations, listing on the nonattainment list and pollutants involved, and any existing uses of the water body that may require greater protection than designated uses. Based in part on this review, the DEQ determines if

coverage under the general permit is appropriate. For water bodies that do not attain designated uses, the DEQ reviews each specific situation including each pollutant that will exist in the discharge. In no event may water quality be lowered below the minimum level required to fully support designated uses. ACS 1999 R 323.1098(5).

CONCLUSION

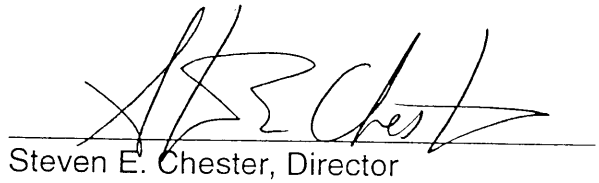
Contrary to the Sierra Club's claims, the General Permit is designed to protect water quality. As with any new program, however, areas for improvement exist. Therefore, through this Declaratory Ruling, the DEQ, WB, is hereby directed to modify the General Permit and application process to yield the following results:

1. All effluent limitations, including the minimum standards portion of the CNMP section, will be included within a new NMP portion of the effluent limitations section. The WB will draft a new general permit for CAFOs that incorporates these concepts. The new general permit will be subject to a new public notice and hearing process.
2. All proposed land application areas and adjacent water bodies shall be identified at the time a CAFO applies for authorization.
3. The CNMP prepared in accordance with the permit's requirements shall be submitted to the appropriate WB district office upon completion and be available to the public upon request.

In accordance with Section 63 of Michigan's Administrative Procedures Act,

1969 PA 306; MCL 24.263, this Declaratory Ruling is subject to judicial review in the same manner as a final agency decision or order in a contested case. As such, if the Sierra Club wishes to seek judicial review of this Declaratory Ruling, a petition is to be filed in the circuit court of Ingham County or other county where the petitioner resides or has a principal place of business. MCL 24.303(1).

Decreed on this 15 day of June, 2005, by:



Steven E. Chester, Director
Department of Environmental Quality